Supreme Court, U.S.
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No. 02-107

IN THE

Supreme Court of the United States

ANN DANIEL AND LEONARD HILL,

Petitioners,

v.

COUNTY OF SANTA BARBARA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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October 1, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF OF PETITIONER

In their opening brief, petitioners demonstrated that respondent's independent and discretionary decision to accept a previously coerced offer to dedicate an easement worked a legally distinct and unconstitutional deprivation of property. Respondent's opposition completely fails to refute petitioners' showing. Although it derides petitioners' takings claim as lacking support in any "decision, treatise [or] law review article," Opp. 12, respondent does not, because it cannot, dispute that petitioners lost the right to exclude others from their property only when, and because, the County accepted the offer. Respondent and the lower court are thus indisputably wrong in asserting that the County's acceptance "took nothing from the Daniels 'that had not already been taken'" from their predecessors in interest. *Id.* at 16 (quoting Pet. App. 11a).

Nor is there any merit to the various claims respondent raises in a vain effort to shield its unconstitutional conduct from review. Indeed, the County's ripeness, waiver, res judicata and statute of limitations arguments all founder for the same reason: petitioners' taking claim did not arise until the County accepted the offer to dedicate. Accordingly, that claim was not ripe in 1974, 1978 or 1987, when the Coastal Commission coerced the offer to dedicate from petitioners' predecessors in interest, and the failure of those prior owners to challenge the Commission's coercion cannot bar judicial review of a taking claim that first arose in 1998.

Finally, the fact that the Ninth Circuit has joined the California Supreme Court in permitting the County to flout this Court's rulings serves to underscore – not diminish – the need for this Court's review. Indeed, recognizing that this Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), prevent the coercion of any new

offers to dedicate, California recently adopted legislation requiring the acceptance of all outstanding offers to dedicate at least 90 days before they are due to expire. Thus, unless this Court acts, respondent and other governmental entities in California will succeed in taking property from literally hundreds of other property owners in violation of this Court's rulings.

1. Respondent accuses petitioners of "[i]nventing" a "new" and "peculiar" takings theory that supposedly lacks support in "any reported decision, treatise [or] law review article." Opp. 12. But this Court long ago held that loss of the right to exclude others is a compensable taking. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). And respondent repeatedly concedes that its acceptance of the offer to dedicate stripped petitioner of this very right. Thus, the County acknowledges that the owner of property subject to an offer to dedicate retains the "right to exclude others while the irrevocable offer of dedication is outstanding," and that this right is "subject to immediate extinction *once the agency accepts the offer*." Opp. 15 (emphasis added); *see also id.* at 14 ("[o]nce the landowner records an irrevocable offer of dedication, he has conveyed away the right to exclude the public *should* the irrevocable offer *ever be accepted*.") (emphases added).

These concessions are compelled by California law, which unambiguously provides that, when an offer to dedicate an easement is made, the public does not thereby "acquire any right to an easement." *People* v. *Williams*, 2 P. 393, 396 (Cal. 1884). "A dedication without acceptance is, in law, merely an offer to dedicate, and such offer *does not impose any burdens nor confer any rights*," unless there is an acceptance. *City of Santa Clara* v. *Ivanovich*, 118 P.2d 303, 307 (Cal. Ct. App. 1941) (emphasis added); see also *Grupe* v. *California Coastal Comm'n*, 212 Cal. Rptr. 578, 592 (Cal. Ct. App. 1985) (an offer to dedicate "will become effective *only if accepted*" and, until accepted, "there is no easement");

Baldwin v. *City of L.A.*, 83 Cal. Rptr. 178, 187 (Cal. Ct. App. 1999) (unconditional acceptance is required to complete a dedication). Accordingly, the owner of property subject to an offer to dedicate "can exclude the public from the privately owned portion of his [property] until such time as a public agency . . . agrees to accept the offer." *Grupe*, 212 Cal. Rptr. at 592. See also *Whalers' Village Club* v. *California Coastal Comm'n*, 220 Cal. Rptr. 2, 15 (Cal. Ct. App. 1985).

Contrary to respondent's claim, petitioners have not "misread[]" California law by mistakenly relying on cases involving "revocable offers of dedication, not irrevocable offers," Opp. 14, 16. In *Grupe*, for example, the property owner was required to record a document "'*irrevocably offering to dedicate* . . . an easement for public access.'" 212 Cal. Rptr. at 581 (emphasis altered) (quoting offer to dedicate). *Grupe* thus involved precisely the same type of irrevocable offer to dedicate as the one at issue here, and the court made clear that the property owner would lose the right to exclude others only if and when such an offer was accepted.

More fundamentally, there is no meaningful distinction between a revocable offer to dedicate and an irrevocable offer that expires if not accepted within a prescribed period of time. In both cases, the mere fact of recordation does *not* inescapably lead to the loss of the right to exclude others. Instead, a public agency must accept the offer before a certain event occurs (revocation in the case of a revocable offer, expiration in the case of the irrevocable offer at issue here). Indeed, this is precisely why the California legislature recently enacted a law requiring acceptance of all outstanding, and soon-to-expire, offers to dedicate. See S.B. 1962, 2002 Leg., Digest & Analysis 3 (Cal. Aug. 28, 2002) ("S.B. 1962") (enacted as 2002 Cal. Stat. 518) ("The law refers to [offers to dedicate] as 'offers' because they have no impact unless a public or nonprofit entity 'accepts' the offer . . . .").

Thus, respondent and the lower court are manifestly wrong in asserting that the County's acceptance "took nothing from the Daniels 'that had not already been taken'" from their predecessors in interest. Opp. 16 (quoting Pet. App. 11a). The County's acceptance stripped petitioners of the right to exclude others – a right petitioners, and their predecessors in interest, retained after the irrevocable offer to dedicate was recorded.[1] Analogizing such an offer to an options contract, *id.* at 15, does not alter the fact that it is only the agency's *exercise* of a right to acquire an easement before an offer to dedicate expires – not the owners' *conferral* of such a time-limited right – that divests the property owner of the right to exclude others.[2]

Nor does *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), support respondent's claim that acceptance of the offer to dedicate worked no deprivation of property. In *Lucas*, the Court noted that assertion of a previously granted *easement* would not constitute a separate taking. See *id.* at

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[1] For this reason, respondent and the lower court are also wrong in asserting that petitioners seek to "'obtain greater rights than those held by their predecessors in interest.'" Opp. 6 (quoting Pet. App. 10a).

[2] Insofar as the Ninth Circuit "presum[ed]" that the full economic loss associated with the taking of the easement occurred before petitioners bought the property, Pet. App. 11a (quoting *Carson Harbor Village Ltd.* v. *City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994), *overruled on other grounds by WMX Techs., Inc.* v. *Miller*, 104 F.2d 1133 (9th Cir. 1997) (en banc), that presumption was plainly mistaken. The Ninth Circuit has "presumed" that a property owner "who purchased land *after an alleged taking [occurred]*" suffered no injury because the purchase price "presumably reflected the market value of the property minus the interests taken." *Carson Harbor Village, Ltd.*, 37 F.3d at 476 (emphasis added). Here, however, petitioners bought the property *before* the right to exclude others was taken, and the County offered no evidence that, at the time of that purchase, the price of the property had already been discounted by the full value of an interest not yet taken. In fact, it was by no means certain that any state agency ever would accept the offer to dedicate. *See* Pet. 16-17; *infra* at 7-8. Accordingly, there is no basis whatever for the lower court's economic speculation.

1028-29 ("we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title."). *Lucas* was careful to note, however, that there is no taking only when an antecedent inquiry into the nature of a property owner's estate reveals that "the proscribed use interests were not part of [the landowner's] title to begin with." See *id.* at 1027. By contrast, here mere recordation of the offer to dedicate did *not* grant the public an actual easement and did not limit the Trust's ability to exclude others from the property.

In short, petitioners suffered an uncompensated taking of their property in violation of this Court's holdings in *Nollan* and *Dolan*. Not suprisingly, therefore, respondent devotes most of its opposition to procedural arguments designed to shield its unconstitutional conduct from review. None of these arguments has merit.

2a. Respondent argues that petitioners' takings claim is not ripe because petitioners never "'sought "compensation through the procedures the State has provided for doing so."'" Op. at 7 (quoting *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997) (quoting *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985))). Notably, however, respondent nowhere claims that petitioners could have actually obtained any compensation through any available state procedure. And for good reason: as the remainder of respondent's brief makes clear, and the pending Petition for Writ of Certiorari in *Cole* v. *County of Santa Barbara*, No. 01-1773 (U.S. filed June 3, 2002), confirms, the California courts have erected a procedural bar that completely precludes recovery of just compensation where, as here, one state entity accepts an offer to dedicate that another state entity previously coerced. In such circumstances, the California courts have held that a challenge to any permit condition requiring recordation of an offer to dedicate must be brought within 60 days of the permit decision itself, even though, under controlling California law,

recordation of the offer does not itself deprive the property owner of the right to exclude others, no state entity has made a final decision to deprive the property owner of that right, and such a deprivation is contingent on future events that may never occur. See *Cole* v. *County of Santa Barbara*, No. B147339, 2001 WL 1613856, at *3-*8 (Cal. Ct. App. Dec. 17, 2001) Thus, the lower court's "[a]ssum[ption] that adequate state procedures were available to seek . . . compensation," Pet. App. 8a, was plainly incorrect.

Indeed, it was precisely because the state courts have erected an impermissible procedural bar to valid takings claims that petitioners brought this action under 42 U.S.C. § 1983. Section 1983 was enacted to provide a federal remedy for violations of federal constitutional rights by state officials. See *Felder* v. *Casey*, 487 U.S. 131, 139 (1988). Petitioners invoked this federal remedy in order to obtain an injunction and a declaration of their rights that they could then use in the state courts to compel the County to live up to its obligations under the Fourteenth Amendment. Having successfully urged the California courts to bar review of the very type of takings claim that petitioners assert, see *Cole* v. *County of Santa Barbara*, 2001 WL 1613856, at *3-*8, respondent cannot now claim that petitioners' refusal to engage in a futile attempt to seek compensation in the state courts should prevent this Court from reviewing the County's unconstitutional conduct. Even if petitioners had begun their takings claim in state court, as respondent claims they should have done, Opp. 7, those claims would have ended up before this Court, without any substantive review by any lower state court. See Petition for Writ of Certiorari, *Cole* v. *County of Santa Barbara*, No. 01-1773 (U.S. filed June 3, 2002).

b. Respondent's waiver, res judicata and statute of limitations arguments are equally misguided, and serve only to highlight the fact that the lower court (like the California courts) misapplied federal ripeness principles. Respondent claims that because petitioners' predecessors in interest

"failed" to assert takings claims when the Coastal Commission required these prior owners to record offers to dedicate in 1974, 1978 and 1987, the lower court properly held that the statute of limitations has run on such claims, which, in respondent's view, are barred in any event by principles of waiver and res judicata. Opp. 9-12. Each of these arguments is predicated on the assumption that petitioners' predecessors in interest could have asserted a ripe takings claim years before any state entity finally decided to accept the offer and thereby divest the property owner of the right to exclude others. That assumption is simply mistaken.

This Cout has consistently ruled that a property owner may not pursue a takings claim until there has been a *final* government decision to take the property. *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985). Under California law, it is clear that no state agency made a final decision to strip petitioners of their right to exclude others from their property until the County accepted the offer to dedicate in 1998. Any claim seeking redress for a physical taking, therefore, would have been entirely premature in 1974, 1978 and 1987; indeed, at each of these times, and for years afterwards, it remained uncertain whether, or when, a public agency might decide to accept the offer to dedicate. See *Grupe*, 212 Cal. Rptr. at 602 ("the Commission cannot know with certainty whether future events will occur that as a practical matter are essential to implementation of [an offer to dedicate]"). In fact, it was this very uncertainty that led the California legislature to adopt a law just this summer requiring public agencies to accept all outstanding offers to dedicate. See 2002 Cal. Stat. 518.[3]

As a result of that uncertainty, moreover, recording landowners would have obtained undeserved windfalls under the lower court's erroneous ripeness determination. If a

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[3] Even this law does not remove all uncertainty, inasmuch as it requires acceptance if sufficient funds are available. S.B. 1962, at 1-2.

taking associated with the acceptance of an offer to dedicate an easement ripened at the time an offer was recorded, the recording landowner would be entitled to compensation for the full value of a property loss that might never materialize, or, as happened in this case, that might be suffered by a subsequent property owner. The prospect of such windfalls simply confirms that no final decision had been made in 1974, 1978 or 1987 to divest any of the prior property owners of the right to exclude others, and that such owners could not have asserted ripe takings challenges seeking compensation for a loss that did not occur until 1998. Accordingly, the statute of limitations did not bar petitioners' suit, which was filed within 30 days of the County's decision to accept the offer.

For these same reasons, the fact that petitioners' predecessors in interest "failed" to assert unripe takings challenges to the 1974, 1978 and 1987 actions of the Coastal Commission does not bar petitioners' claim under waiver or res judicata principles. None of the state law cases respondent cites in an attempt to demonstrate otherwise, see Opp. 10-12, involved a challenge to a state entity's *acceptance* of a previously compelled offer to dedicate an easement. Rather, the only state actions at issue in those cases were permit decisions that were alleged to have caused immediate property deprivations, or other immediate injuries.[4] The California courts' determinations in these cases

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[4] *See California Coastal Comm'n* v. *Superior Court*, 258 Cal. Rptr. 567 (Cal. Ct. App. 1989) (post-*Nollan* action seeking to set aside permit condition requiring dedication of an easement in exchange for permit); *Rossco Holdings, Inc.* v. *State*, 260 Cal. Rptr. 736 (Cal. Ct. App. 1989) (same); *Patrick Media Group, Inc.* v. *California Coastal Comm'n*, 11 Cal. Rptr. 2d 824 (Cal. Ct. App. 1992) (inverse condemnation action by billboard owner seeking compensation for off-site billboards that the owner's lessor removed in order to comply with a permit); *Ojavan Investors, Inc.* v. *California Coastal Comm'n*, 32 Cal. Rptr. 2d 103 (Cal. Ct. App. 1994) (action challenging permit conditions that required the owner's predecessor-in-interest to record development restrictions on

that claims seeking redress for such injuries should have been brought in actions challenging the permit decisions themselves have no bearing here, where petitioners seek redress for a taking that did not result from the Coastal Commission's various actions in the 1970s and 1980s, but instead flowed from the County's 1998 decision to accept the offer to dedicate.

3. Finally, respondent's claim that this case raises no important issues of federal law is, at best, unpersuasive, and, at worst, cynical. Petitioners do not ask this Court "to create a new constitutional rule," Opp. 13, but rather to ensure that the County and other agencies throughout the California do not succeeding in flouting the rules this Court announced in *Nollan* and *Dolan*. Indeed, the County nowhere attempts to show that the appropriation of petitioners' property satisfied the nexus and proportionality standards this Court announced in those case. Nor does respondent deny that the Coastal Commission is urging agencies throughout the State to accept hundreds of other soon-to-expire offers to dedicate with full knowledge that virtually none of the resulting easements could satisfy the requirements of the Fifth Amendment. In fact, since the filing of this petition, the California legislature has *mandated* the acceptance of such offers because it recognizes that the Coastal Commission has not been able to coerce new offers since *Nollan*. The Ninth Circuit's failure to put a stop to such open flouting of this Court's rulings is itself an important reason to grant review, not a ground for denying it. See *id.* at 2.

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building sites, including a dedication of an easement); *County of Imperial* v. *McDougal*, 564 P.2d 14 (Cal. 1977) (action challenging a condition in a special permit granted to predecessor in title); *City of Santee* v. *Superior Court*, 279 Cal. Rptr. 22 (Cal. Ct. App. 1991) (action seeking declaration that permit conditions that landowner had accepted were invalid); *Pfeiffer* v. *City of La Mesa*, 137 Cal. Rptr. 804 (Cal. Ct. App. 1977) (inverse condemnation action seeking to recover damages allegedly caused by compliance with permit condition that landowner accepted and never challenged).

Respondent's assertion that petitioners "completely overstate" the importance of these issues because few other landowners will be so "presumptuous" as to "seek to renege on [their] legal obligations," Opp. 13 & n.4, is utterly disingenuous. The Coastal Commission did not attempt to satisfy the nexus and proportionality requirements when it coerced offers to dedicate from property owners prior to 1987, yet it has not hesitated to use extraordinary strong-arm tactics to compel compliance with such coerced offers. See Pet. 4 (explaining threats of heavy fines Coastal Commission used to compel the Bucklews to record an offer to dedicate); Reply Brief of Petitioner at 9 n.5, *Cole* v. *County of Santa Barbara*, No. 01-1773 (U.S. filed June 3, 2002) (describing threats of fines totaling millions of dollars leveled at trustee who challenged validity of 1980 offer to dedicate). These retaliatory tactics, coupled with the California and federal courts' decisions to permit acceptance of illegally coerced offers, ensures that few if any landowners will have the temerity to contest appropriations of easements across their property, no matter how egregious the resulting constitutional violation. Thus, the absence of challenges like the one petitioners have mounted is not evidence that property owners do not object to the unconstitutional appropriation of their property, but merely confirms that the Coastal Commission and local governments are succeeding in thwarting the requirements of *Nollan* and *Dolan*. If this Court denies the petition, these entities will only be further emboldened, and other States can be expected to use California's blueprint for escaping this Court's holdings in *Nollan* and *Dolan*.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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